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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

32 CFR Part 2003

[NARA-12-0003]

RIN 3095-AB76

The Interagency Security Classification Appeals Panel (ISCAP) Bylaws, Rules, and Appeal Procedures

AGENCY: Information Security Oversight Office, National Archives and Records Administration.

ACTION: Direct final rule.

SUMMARY: The Interagency Security Classification Appeals Panel (ISCAP) is a Presidential panel that decides on certain classification and declassification issues, as established in Executive Order 13526, Classified National Security Information, December 29, 2009, section 5.3(a)(1), and the E.O.'s implementing directives. Section 5.3(c) of the E.O. directs ISCAP to issue bylaws, rules, and procedures and to publish them in the *Federal Register*. ISCAP previously published its bylaws as a regulatory appendix, Classified National Security Information Directive No. 1. This rule revamps ISCAP's bylaws and appellate procedures and publishes them in their own part for easier access.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], without further action, unless adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION]

IN THE FEDERAL REGISTER]. If adverse comment is received, NARA will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: NARA invites interested persons to submit comments on this direct final rule. Please include “Attn: 3095-AB76 and your name and mailing address in your comments. Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: Submit comments by facsimile transmission to 301-837-0319, attention Regulations Comments Desk.
- Mail: Send comments to Strategy and Policy Office (SP); Regulations Comments Desk, Room 4100; National and Archives Records Administration; ATTN: Laura McCarthy; 8601 Adelphi Road; College Park, MD 20740.
- Hand Delivery or Courier: Deliver comments to 8601 Adelphi Road, College Park, MD. Address them to Strategy and Policy Office (SP); Regulations Comments Desk, Room 4100, ATTN: Laura McCarthy.

FOR FURTHER INFORMATION CONTACT: John P. Fitzpatrick, Director, ISOO, at 202-357-5250.

SUPPLEMENTARY INFORMATION: ISCAP is a Presidential appellate panel made up of representatives from the Departments of State, Defense, and Justice, the National Archives and Records Administration, the Office of the Director of National Intelligence, and the National Security Advisor, with an occasional representative from the Central Intelligence Agency. The director of the Information Security Oversight Office (ISOO),

a unit of the National Archives and Records Administration (NARA), has been tasked by E.O. 13526 as the Panel's Executive Secretary, and the ISOO staff as the administrative staff supporting the Panel. As a result, the ISCAP bylaws and appellate procedures are published by NARA along with other ISOO regulations.

ISCAP's bylaws were previously published in 2004 as Appendix A to ISOO's Directive 1. When ISOO's directive was updated in 2009, the ISCAP bylaws were not included as an appendix again, and are now being added, along with appellate procedures, for publication as Part 2003. Publishing ISCAP's bylaws and appellate procedures in a separate part will make them easier to find and to use.

This rule is effective upon publication for good cause as permitted by the Administrative Procedure Act (5 U.S.C. § 553(d)(3)). NARA believes that delaying the effective date for 30 days is unnecessary as this rule represents minor technical amendments from the previous by-laws as mandated by E.O. 13526.

This direct final rule is not a significant regulatory action for the purposes of E.O. 12866 and has [not] been reviewed by the Office of Management and Budget (OMB). The proposed amendment is also not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking. As required by the Regulatory Flexibility Act, we certify that this rule will not have a significant impact on a substantial number of small entities because it sets out only the bylaws by which the Panel will operate and the review procedures for Federal agency declassification actions.

List of Subjects in 32 CFR Part 2003

Classified information.

For the reasons stated in the preamble, NARA adds 32 CFR Part 2003, to read as

follows:

PART 2003---INTERAGENCY SECURITY CLASSIFICATION APPEALS

PANEL (ISCAP) BYLAWS, RULES, AND APPEAL PROCEDURES

Subpart A – Bylaws

Sec.

- 2003.1 Purpose (Article I).
- 2003.2 Authority (Article II).
- 2003.3 Functions (Article III).
- 2003.4 Membership (Article IV).
- 2003.5 Meetings (Article V).
- 2003.6 Voting (Article VI.).
- 2003.7 Support Staff (Article VII).
- 2003.8 Records (Article VIII).
- 2003.9 Reports to the President (Article IX).
- 2003.10 Approval, amendment, and publication of bylaws, rules, and procedures (Article X).

Subpart B – Appeal Procedures

Sec.

- 2003.11 Appeals of agency decisions regarding classification challenges under section 1.8 of the Order.
- 2003.12 Review of agency exemptions from automatic declassification under section 3.3 of the Order.
- 2003.13 Appeals of agency decisions denying declassification under mandatory review provisions in section 3.5 of the Order.
- 2003.14 Dissemination of ISCAP decisions.
- 2003.15 Additional functions.

Authority: E.O. 13526, 75 FR 707, 75 FR 1013, 3 CFR, 2010 Comp., p. 298

Subpart A – Bylaws

§ 2003.1 Purpose (Article I).

The Interagency Security Classification Appeals Panel (hereafter “ISCAP” or “the Panel”) advises and assists the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States.

2003.2 Authority (Article II).

ISCAP was established by, and receives its authority from, Executive Order 13526 "Classified National Security Information" (hereafter the "Order"), December 29, 2009, section 5.3(a)(1), and the Order's implementing directives. Section 5.3(c) of the Order directs ISCAP to issue bylaws, rules, and procedures and to publish them in the *Federal Register*.

§ 2003.3 Functions (Article III).

In carrying out its purpose, the Panel:

- (a) Decides appeals by people who have filed classification challenges under section 1.8 of the Order;
- (b) Approves, denies, or amends agency exemptions from automatic declassification under section 3.3 of the Order;
- (c) Decides appeals by people or entities who have filed requests for mandatory declassification review under section 3.5 of the Order; and
- (d) Informs senior agency officials and the public, as appropriate, of final Panel decisions on appeals under sections 1.8 and 3.5 of the Order.

§ 2003.4 Membership (Article IV).

- (a) Member organizations and members.

(1) The Departments of State, Defense, and Justice, the National Archives and Records Administration, the Office of the Director of National Intelligence, and the National Security Advisor each have a member on the Panel.

(2) Additionally, the Director of the Central Intelligence Agency may appoint a temporary representative, who meets the member criteria, to participate as a voting

member in all Panel deliberations and associated support activities concerning classified information originated by the Central Intelligence Agency.

(b) Alternate member. Each member organization also designates in writing an alternate, or alternates, to represent it on all occasions when the primary member is unable to participate. When serving for a primary member, an alternate assumes all the rights and responsibilities of that primary member, including voting. The alternate member must meet the member criteria. The member organization head, or the organization's deputy or senior agency official for the Order, makes the written designation of an alternate, addressed to the ISCAP Chair.

(c) Selection criteria for member.

(1) Members must be senior-level agency Federal officials or employees, full-time or permanent part-time, and must be designated to serve as a member on the Panel by the respective agency head.

(2) Panel members must meet security access criteria in order to fulfill the Panel's functions.

(d) Member vacancies. Vacancies among the primary members must be filled as quickly as possible. The Chair, working through the Executive Secretary, takes all appropriate measures to encourage the organization to fill the vacancy quickly. In the interim, the organization's designated alternate serves as its member.

(e) Liaisons. Each member organization also designates in writing an individual or individuals (hereafter "liaisons") to serve as liaison to the Executive Secretary in support of the primary member and alternate(s). The liaisons meet at the call of the Executive

Secretary. The agency head, or the deputy or senior agency official for the Order, makes the written designation, addressed to the ISCAP Chair.

(f) Chair. The President of the United States selects the Chair from among the primary members.

(g) Vice Chair. The members may elect from among the primary members a Vice Chair who:

(1) Chairs meetings that the Chair is unable to attend; and

(2) Serves as Acting Chair during a vacancy in the Chair of the ISCAP.

(h) Executive Secretary. The Director of the Information Security Oversight Office (ISOO), National Archives and Records Administration, is the Executive Secretary of the Panel and oversees the Panel's support staff.

§ 2003.5 Meetings (Article V).

(a) Purpose. The primary purpose of ISCAP meetings is to discuss and bring formal resolution to matters before the Panel and carry out the functions listed in § 2003.3, Article III, of these bylaws.

(b) Frequency. The Panel meets at the call of the Chair, who schedules meetings as necessary for the Panel to fulfill its functions in a timely manner. The Chair also convenes the ISCAP when requested by a majority of its member organizations.

(c) Quorum. Panel meetings may be held only when a quorum is present. For this purpose, a quorum requires the presence of at least five primary or alternate members.

(d) Attendance. As determined by the Chair, attendance at Panel meetings is limited to only the people necessary for the Panel to fulfill its functions in a complete and timely

manner. The members may arrange briefings by substantive experts from individual departments or agencies, after consultation with the Chair.

(e) Agenda. The Chair establishes the agenda for all meetings. Any member or the Executive Secretary may submit potential items for the agenda. Acting through the Executive Secretary, the Chair distributes the agenda and supporting materials to the members as soon as possible before a scheduled meeting.

(f) Minutes. The Executive Secretary and staff prepare each meeting's minutes, and distribute draft minutes to each member. The minutes include a record of the members present at the meeting and the result of each vote. At each Panel meeting, the Chair reads or references the previous meeting's draft minutes. At that time the minutes are corrected, as necessary, approved by the membership, and certified by the Chair. The approved minutes are maintained among the Panel's records.

§ 2003.6 Voting (Article VI).

(a) Motions. When the Panel is required to make a decision or recommendation to resolve a matter before it, the Chair requests or accepts a motion for a vote. Any member, including the Chair, may make a motion for a vote. No second is required to bring any motion to a vote. A quorum must be present when a vote is taken.

(b) Eligibility. Only the member, including the Chair, may vote on a motion before the ISCAP, with each represented member organization having one vote.

(c) Voting procedures at meetings. Votes are ordinarily taken and tabulated by a show of hands.

(d) Passing a motion. In response to a motion, members may vote affirmatively, negatively, or abstain from voting. A motion passes when it receives a majority of

affirmative votes of the members voting. In circumstances in which members abstain from voting, a Panel decision to reverse an agency's classification decision requires the affirmative vote of at least a majority of the members present.

(e) Votes in a non-meeting context. The Chair may call for a vote of the membership outside the context of a formal ISCAP meeting. An alternate member may also participate in such a vote if the primary member cannot be present. The Executive Secretary records and retains such votes in a documentary form and immediately reports the results to the Chair and other primary or alternate members, including all notes of concurrence or dissent. If a member expresses dissent to taking a non-meeting vote, any member may request the Chair call a meeting of the members to discuss the issue under consideration and to hold an in-person vote.

§ 2003.7 Support Staff (Article VII).

The staff of the Information Security Oversight Office (ISOO), National Archives and Records Administration, provides program and administrative support for the Panel. The Executive Secretary supervises the staff in this function pursuant to the direction of the Chair and ISCAP. On an as-needed basis, the Panel may seek detailees from agencies to augment the ISOO staff in support of the ISCAP. All staff must meet security access criteria in order to fulfill the Panel's functions.

§ 2003.8 Records (Article VIII).

(a) Integrity of ISCAP Records. The Executive Secretary maintains records that are produced by or presented to the ISCAP or its staff in the performance of the Panel's functions, consistent with applicable law.

(b) Access requests or Freedom of Information Act (FOIA) requests for ISCAP records.

The Panel refers any FOIA request or other access request for information that originated within an agency other than the ISCAP to that agency for processing. The Panel processes requests for information originated by the ISCAP in accordance with 44 U.S.C. sections 2201-2207 (Presidential Records Act).

(c) Disposition. The Executive Secretary maintains Panel records in accordance with 44 U.S.C. sections 2201-2207 (Presidential Records Act).

§ 2003.9 Reports to the President (Article IX).

ISOO includes pertinent information and data about the activities of the Panel in ISOO's reports to the President of the United States. The Panel also includes such information in any reports it may make to the President. The Chair, in coordination with the other members of the ISCAP and the Executive Secretary, determines what information and data to include in each report.

§ 2003.10 Approval, amendment, and publication of bylaws, rules, and procedures (Article X).

Approval and amendment of Panel bylaws, rules, and procedures requires the affirmative vote of at least four members. The Executive Secretary submits approved bylaws, rules, procedures, and their amendments, for publication in the *Federal Register*.

Subpart B – Appeal Procedures

2003.11 Appeals of agency decisions regarding classification challenges under section 1.8 of the Order.

Authorized holders of information who, in good faith, believe that its classification status is improper may challenge an agency's classification of the information in accordance

with agency procedures. After challenging the classification at the agency level, the authorized holder may appeal the agency's decision to the ISCAP.

(a) Jurisdiction. The ISCAP will consider and decide appeals from classification challenges that otherwise meet the standards of the Order if:

- (1) The appeal is filed in accordance with these procedures;
- (2) The appellant has previously challenged the classification action at the agency that originated, or is otherwise responsible for, the information in question. The previous challenge must have followed the agency's established procedures or, if the agency has failed to establish procedures, the appellant must have filed a written challenge directly with the agency head or designated senior agency official, as defined in section 5.4(d) of the Order;
- (3) The appellant has:
 - (i) Received a final agency decision denying his or her challenge; or
 - (ii) Not received --
 - (A) An initial written response to the classification challenge from the agency within 120 days of its filing, or
 - (B) A written response to an agency level appeal within 90 days of the filing of the appeal;
- (4) There is no action pending in the federal courts regarding the information in question;
- (5) The information in question has not been the subject of a FOIA or mandatory declassification review within the past two years; and
- (6) The information in question has not been the subject of a prepublication review or

other administrative process pursuant to an approved nondisclosure agreement.

(b) Submission of appeals. Appeals may be submitted to the Panel by e-mail or mail.

Appeals should be sent via e-mail to: ISCAP@nara.gov or by mail to: Executive Secretary, Interagency Security Classification Appeals Panel; Attn: Classification Challenge Appeals; c/o Information Security Oversight Office; National Archives and Records Administration; 700 Pennsylvania Avenue, NW, Room 503; Washington, DC 20408.

(1) The appeal must contain enough information for the Executive Secretary to be able to obtain all pertinent documents about the classification challenge from the affected agency.

(2) No classified information should be included within the initial appeal correspondence. The Executive Secretary will arrange for the transmittal of classified information from the agency after receiving the appeal. If it is impossible for the appellant to file an appeal without including classified information, prior arrangements must be made by contacting the Panel in one of the two methods listed above.

(c) Timeliness of appeals. An appeal to the ISCAP must be filed within 60 days of:

(1) The date of the final agency decision; or

(2) The agency's failure to meet the time frames established in paragraph (a)(3)(i) and (ii) of this section.

(d) Rejection of appeals. If the Executive Secretary determines that an appeal does not meet the requirements of the Order or these bylaws, the Executive Secretary notifies the appellant in writing that the appeal will not be considered by the ISCAP. The notification includes an explanation of why the appeal is deficient.

(e) Preparation of appeals and creation of appeals files. The Executive Secretary notifies the designated senior agency official, and, if applicable, the primary member, alternate, or liaison of the affected agency(ies) when an appeal is lodged. Under the direction of the ISCAP, the Executive Secretary supervises the preparation of an appeal file, pertinent portions of which are presented to the members of the Panel for review prior to a vote on the appeal. The appeal file eventually includes all records pertaining to the appeal.

(f) Resolution of appeals. The Panel may vote to affirm the agency's decision, to reverse the agency's decision in whole or in part, or to remand the matter to the agency for further consideration. A decision to reverse an agency's decision requires the affirmative vote of at least a majority of the members present. In circumstances in which members abstain from voting, a Panel decision to reverse an agency's classification decision requires the affirmative vote of at least a majority of the members present.

(g) Notification. The Executive Secretary promptly notifies the appellant and the designated senior agency official in writing of the Panel's decision.

(h) Agency appeals. Within 60 days of receipt of an ISCAP decision that reverses a final agency decision, the agency head may petition the President through the National Security Advisor to overrule the Panel's decision. The information at issue remains classified until the President has issued a decision.

(i) Protection of classified information. All persons involved in the appeal will make every effort to minimize the inclusion of classified information in the appeal file. Any classified information contained in the appeal file is handled and protected in accordance with the Order and its implementing directives. Information being challenged for classification remains classified unless and until a final decision is made to declassify it.

(j) Maintenance and disposition of file. The Executive Secretary maintains the appeal file among the ISCAP's records in accordance with 44 U.S.C. 2201-2207 (the Presidential Records Act).

§ 2003.12 Review of agency exemptions from automatic declassification under section 3.3 of the Order.

All classified records that are more than 25 years old and have been determined to have permanent historical value under title 44, United States Code, are automatically declassified whether or not the records have been reviewed. However, agency heads may exempt information that would otherwise fall into this category on specific bases set out in section 3.3 of the Order. The ISCAP reviews and approves, denies, or amends agency proposals to exempt such information from automatic declassification.

(a) Agency notification of exemptions. The agency head or designated senior agency official notifies the Executive Secretary of proposed agency exemptions in accordance with the requirements of the Order and its implementing directives. Agencies provide any additional information or justification that the Executive Secretary believes is necessary or helpful in order for the ISCAP to review and decide on the exemption.

(b) Preparation of the exemptions files. The Executive Secretary notifies the Chair of an agency's submission. At the direction of the ISCAP, the Executive Secretary supervises the preparation of an exemption file, pertinent portions of which are presented to the members of the Panel for review prior to a vote on the exemptions. The exemption file eventually includes all records pertaining to the ISCAP's consideration of the agency's exemptions.

(c) Resolution. The Panel may vote to approve an agency exemption, to deny an agency

exemption, to amend an agency exemption, or to remand the matter to the agency for further consideration. A decision to deny or amend an agency exemption requires the affirmative vote of a majority of the members present.

(d) Notification. The Executive Secretary promptly notifies the designated senior agency official in writing of the Panel's decision.

(e) Agency appeals. Within 60 days of receipt of an ISCAP decision that denies or amends an agency exemption, the agency head may petition the President through the National Security Advisor to overrule the Panel's decision.

(f) Protection of classified information. All persons involved in the appeal will make every effort to minimize the inclusion of classified information in the appeal file. Any classified information contained in the exemption file is handled and protected in accordance with the Order and its implementing directives. Information that the agency maintains is exempt from declassification remains classified unless and until a final decision is made to declassify it.

(g) Maintenance and disposition of file. The Executive Secretary maintains the exemption file among the ISCAP's records in accordance with 44 U.S.C. 2201-2207 (the Presidential Records Act).

§ 2003.13 Appeals of agency decisions denying declassification under mandatory review provisions in section 3.5 of the Order.

Section 3.5 of the Order requires agencies to conduct a mandatory declassification review, upon request, of classified information that meets the requirements set out in the Order. An agency may deny such a review for specific reasons set out in section 5.3(a) of the Order. If an agency denies a request for such review, a person may appeal the

denial through the agency's appeal process. After that process, a person may further appeal to the ISCAP.

(a) Jurisdiction. The ISCAP considers and decides appeals from denials of mandatory review for declassification requests that otherwise meet the standards of the Order if:

- (1) The appeal is filed in accordance with these procedures;
- (2) The appellant has previously filed a request for mandatory declassification review at the agency that originated, or is otherwise responsible for, the information in question, and filed an appeal at the agency level. The request and appeal must have followed the agency's established procedures or, if the agency has failed to establish procedures, the appellant must have filed a written request directly with the agency head or designated senior agency official;
- (3) The appellant has:
 - (i) Received a final agency decision denying his or her request; or
 - (ii) Not received --
 - (A) An initial decision on the request for mandatory declassification review from the agency within one year of its filing, or
 - (B) A final decision on an agency level appeal within 180 days of the filing of the appeal;
- (4) There is no action pending in the federal courts regarding the information in question;
- (5) The information in question has not been the subject of an access review by the Federal courts or the ISCAP within the past two years; and
- (6) The information in question is not the subject of a prepublication review or other administrative process pursuant to an approved nondisclosure agreement.

(b) Submission of appeals. Appeals may be submitted to the Panel by e-mail or mail.

Appeals should be sent via e-mail to: ISCAP@nara.gov or by mail to: Executive

Secretary, Interagency Security Classification Appeals Panel; Attn: Mandatory

Declassification Review Appeals; c/o Information Security Oversight Office; National

Archives and Records Administration; 700 Pennsylvania Avenue, NW, Room 503;

Washington, DC 20408.

(1) The appeal must contain enough information for the Executive Secretary to be able to obtain all pertinent documents about the mandatory declassification review appeal from the affected agency.

(2) No classified information should be included within the initial appeal correspondence. The Executive Secretary will arrange for the transmittal of classified information from the agency after receiving the appeal. If it is impossible for the appellant to file an appeal without including classified information, prior arrangements must be made by contacting the Panel in one of the two methods listed above.

(c) Timeliness of appeals. An appeal to the ISCAP must be filed within 60 days of:

(1) The date of the final agency decision; or

(2) The agency's failure to meet the time frames established in paragraph (a)(3)(i) and (ii) of this section.

(d) Rejection of appeals. If the Executive Secretary determines that an appeal does not meet the requirements of the Order or these bylaws, the Executive Secretary notifies the appellant in writing that the appeal will not be considered by the ISCAP. The notification includes an explanation of why the appeal is deficient.

(e) Preparation of appeals and creation of appeals files. The Executive Secretary notifies

the senior agency official or primary member, alternate, or liaison of the affected agency(ies) when an appeal is lodged. Under the direction of the ISCAP, the Executive Secretary supervises the preparation of an appeal file, pertinent portions of which are presented to the members of the Panel for review prior to a vote on the appeal. The appeal file eventually includes all records pertaining to the appeal.

(f) Narrowing appeals. To expedite the resolution of appeals and minimize backlogs, the Executive Secretary consults as relevant with appellants and agencies to narrow or prioritize the information subject to the appeal.

(g) Resolution of appeals. The Panel may vote to affirm the agency's decision, to reverse the agency's decision in whole or in part, or to remand the matter to the agency for further consideration. A decision to reverse an agency's decision requires the affirmative vote of at least a majority of the members present. In circumstances in which members abstain from voting, a Panel decision to reverse an agency's classification decision requires the affirmative vote of at least a majority of the members present.

(h) Notification. The Executive Secretary promptly notifies the appellant and designated senior agency official in writing of the Panel's decision.

(i) Agency appeals. Within 60 days of receipt of an ISCAP decision that reverses a final agency decision, the agency head may petition the President through the National Security Advisor to overrule the Panel's decision.

(j) Protection of classified information. All persons involved in the appeal will make every effort to minimize the inclusion of classified information in the appeal file. Any classified information contained in the appeal file is handled and protected in accordance with the Order and its implementing directives. Information that is subject to an appeal

from an agency decision denying declassification under the mandatory review provisions of the Order remains classified unless and until a final decision is made to declassify it.

(k) Maintenance and disposition of file. The Executive Secretary shall maintain the appeal file among the ISCAP's records in accordance with 44 U.S.C. 2201-2207 (Presidential Records Act).

§ 2003.14 Dissemination of ISCAP decisions.

The Executive Secretary informs senior agency officials and the public of final ISCAP decisions on appeals under sections 1.8 and 3.5 of the Order.

§ 2003.15 Additional functions.

As directed by the President through the National Security Advisor, the ISCAP performs such additional advisory functions as are consistent with, and supportive of, the successful implementation of the Order.

Dated: June 25, 2012

John P. Fitzpatrick,

Director, Information Security Oversight Office.

Approved: June 25, 2012

David S. Ferriero

Archivist of the United States

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